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Supreme Court, U.S.
FILED

No. 93-1656

APR 20 1994

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In The

Supreme Court of the United States

October Term, 1993

P.T. EICHELBERGER, JR., M.D. and
LOUIS B. HUGHES, M.D.,

Petitioners,

v.

JULES BALETTE, M.D., DOUGLAS AYCOCK, M.D., DONALD CHALMERS, D.D.S., C.D. DELERY, M.D., C.O. DUBE, M.D., WILLIAM H. FAGAN, M.D., CHARLES HILL, M.D., CHARLES M. HOWARD, M.D., GLEN E. KELLER, M.D., EDWARD ROBERSON, M.D., and E.O. SMITH, M.D., Individually and Doing Business as HOUSTON NORTH PROPERTIES, a Texas Partnership, HOUSTON NORTH HOSPITAL PROPERTIES, A Texas Partnership, HOUSTON NORTHWEST MEDICAL CENTER, INC./HOUSTON NORTHWEST MEDICAL CENTER SURVIVOR, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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74 pp

QUESTIONS PRESENTED

1. Whether the U.S. Supreme Court's decision not to review appellate court decisions that violate the U.S. Constitution and Federal law, as interpreted by the Court, violate a party's rights or due process and equal protection under the United States Constitution?

2. Whether the U.S. Supreme Court and the Federal Appellate Courts should give credit to State and Federal Court Judgments and Opinions obtained by fraud on the Courts, by officers of the Court, in total disregard for the U.S. and Texas Constitutions, statutory laws, and the law as interpreted by the United States Supreme Court?

3. Whether the Federal district and appellate court have authority to find that a debt based on a fraudulent proof of claim is dischargeable or is the Court mandated, by oath and duty, to report the fraud as a Federal Crime under 18 U.S.C. Section 152?

4. Whether a post answer default judgment entered without notice or trial setting is non-dischargeable under 11 U.S.C. Section (a)(6)?

PARTIES TO THE PROCEEDINGS

Petitioners are P. T. Eichelberger, Jr., M.D. and Louis B. Hughes, M.D.

Respondents are:

Jules Balette, M.D., Donald Chalmers, D.D.S., C.D. Delery, M.D., Clarence O. Dube, M.D., William H. Fagan, M.D., Eugene Fonteno, M.D., Glen E. Keller, M.D., Edward Roberson, M.D., E.O. Smith, M.D., Individually and d/b/a Houston North Properties, a Texas Partnership, and Douglas Aycock, M.D., Jules Balette, M.D. Donald Chalmers, D.D.S., C.D. Delery, M.D., Clarence O. Dube, M.D., William H. Fagan, M.D., Eugene Fonteno, M.D., Glen E. Keller, M.D., Edward Roberson, M.D., E.O. Smith, M.D., Individually and d/b/a/ Houston North Hospital Properties, a Texas Partnership, and Houston Northwest Medical Center, Inc./Houston Northwest Medical Center Survivor, Inc.

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1. Under *Peralta v. Heights Medical Center, Inc.*, the Court in reviewing a bill of review concerning a default judgment held that "a judgment entered without notice or service is constitutionally infirm". "Failure to give notice violates the most rudimentary demands of due process of law." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

   Petitioners sought review of the Texas Supreme Court's decision denying their petition for Bill of Review of a post answer default judgment, entered without notice or a trial setting, in this Court, No. 93,421, because their petition for Bill of Review contained all the elements needed for relief as stated by this Court in *Peralta*. The Court denied the Application for Writ of Certiorari and Motion for Rehearing.

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2. Under *Brown v. Felson,* 442 U.S. 127 (1979), the Court held that res judicata does not apply to judgments obtained by fraud.

   Petitioners produced clear evidence of the fraud perpetrated on the courts by officers of the courts, including a fraudulent proof of claim. The Federal District Court found the debt based on the fraudulent proof of claim "non-dischargeable". The appellate court found the debt "dischargeable".

3. 18 U.S.C. § 152 makes filing a fraudulent proof of claim a federal crime, not a dischargeable debt.

4. 11 U.S.C. § 523(a)(6) requires a willful and malicious injury.

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OPINIONS BELOW

This is the second Application for Writ of Certiorari that Petitioners have brought before this Court seeking justice from a postanswer default judgment entered, without notice or trial setting, and a fraudulent proof of claim pertaining to a fully paid judgment.

The first application, No. 93-421 was from the Texas Supreme Court's refusal of Petitioners' Application for Writ of Error on May 19, 1993, with the notation "Writ denied". The Texas Supreme Court overruled Petitoiners' Motion for Rehearing and overruled the Motion for Judicial Notice on June 16, 1993. [See Appendix A, 1a]. The Fourteenth Court of Appeals affirmed the 334th District Court's order of Dismissal with Prejudice of Petitioner's Petition for Bill of Review of the postanswer default judgment and denied the Motion for Rehearing on December 3, 1992 although the Petition for Bill of Review clearly met the requirements as stated by this Court in *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 108 S.Ct. 896 (1988). The opinion is reported in *Philip T. Eichelberger, Jr., M.D. and Louis B. Hughes, M.D. v. Jules Balette, et al.*, 841 S.W.2d 508 (Tex. Ct. App. – Houston [14th Dist.] 1992). The decision of the 334th District Court for Harris County dismissing with prejudice the petition for bill of review is unpublished. [See Appendix B, 2a].

The second application begins in the bankruptcy court where the postanswer default judgment drove Drs. Eichelberger and Hughes. On August 29, 1989, after a bench trial, the bankruptcy court held the debts created by the Houston North Properties' postanswer default judgment and the debt based on the Houston North

Hospital Properties' fraudulent proof of claim were dischargeable. [See Appendix C, 3a]. On appeal, the District Court found the fully paid Houston North Hospital Properties debt and the Houston North Properties postanswer default judgment non-dischargeable on March 12th, 1992. [See Appendix D, 5a]. On September 28, 1992, the District Court denied Petitioners' Motion for Rehearing. [See Appendix E, 10a]. Oral argument scheduled on Petitioners' appeal for October 6, 1993, was cancelled by Judge Edith Jones. On December 14, 1993, the panel of Circuit Judges Goldberg, Jones and Duhe, affirmed the District Court's opinion finding the Houston North Properties postanswer default judgment non-dischargeable and reversed the District Court's decision finding that the Houston North Hospital Properties fully paid debt based on a fraudulent proof of claim "dischargeable". [See Appendix F, 11a]. The panel ordered the opinion not to be published. On January 20, 1994, the Fifth Circuit denied Petitioners' Motion for Rehearing. [See Appendix G, 19a].

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The case involves important public issues that mandate the court's review of state court judgments and appellate opinions obtained by fraud on the courts, by officers of the court, and affirmed by the Federal District and Appellate Courts, in total disregard for the U. S. Constitution and the laws as interpreted by this Court. The Federal District and Appellate Court decisions upholding the Houston North Properties state court post

answer default judgment and the Houston North Hospital Properties debt based on a fraudulent proof of claim contravenes the following precedents of this Court:

1. A judgment entered without notice violates the Due Process Clause of the U. S. Constitution. *Peralta v. Heights Medical Center, Inc.*, 108 S.Ct. 896 (1988); *Mullane v. Central Hanover Bank & Trust Co.*, 70 S.Ct. 652; *Armstrong v. Manzo*, 380 U.S. 545, 85 S.Ct. 1187 (1965).

2. Due process requires that no other jurisdiction shall give effect, even as a matter of comity to a judgment obtained without due process. *Griffin v. Griffin*, 6 S.Ct. 556 (1944).

3. A judgment procured by fraud on the courts, by officers of the court, is not fully and fairly litigated and is void. *Hazel Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238, 245 (1944).

Review by this Court is fundamental to the protection of the U. S. Constitutional rights of all citizens and the preservation of the integrity and dignity of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. XIV, Section 1 provides:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. 1 provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Rule 329(b)(f) of the Texas Rules of Civil Procedure provides:

> On expiration of the time within which the trial court has plenary power, a judgment cannot be set aside by the trial court except by bill of review for sufficient cause, filed within the time allowed by law; provided that the court may at any time correct a clerical error in the record of a judgment and render a judgment nunc pro tunc under Rules 316 and 317, and may also sign an order declaring a previous judgment or order to be void because signed after the court's plenary power has expired.

Rule 161 of the Texas Rules of Civil Procedure provides:

> When some of the several defendants in a suit are served with process in due time and others are not so served, the plaintiff may either dismiss as to those not so served and proceed against those who are, or he may take new process against those not served, or may obtain severance of the case as between those served and those not served, but no dismissal shall be allowed as to a principa! obligor without also dismissing the parties secondarily liable except in cases provided by statute. No defendant against whom any suit may be so dismissed shall be thereby exonerated from any liability, but may at any time be proceeded against as if no such suit had been brought and no such dismissal ordered.

Rule 243 of the Texas Rules of Civil Procedure provides:

> If the cause of action is unliquidated or be not proved by an instrument in writing, the court shall hear evidence as to damages and shall render judgment therefor, unless the defendant shall demand and be entitled to a trial by jury in which case the judgment by default shall be noted, a writ of inquiry awarded, and the cause entered on the jury docket.

Rule 245 of the Texas Rules of Civil Procedure provides:

> The court may set contested cases on written request of any party, or on the court's own motion, with reasonable notice of not less than forty-five days to the parties of a first setting for trial, or by agreement of the parties; provided, however, that when a case previously has been set for trial, the Court may reset said contested case to a later date on any reasonable notice to the parties or by agreement of the parties. Non-contested cases may be tried or disposed of any time whether set or not, and may be set at any time for any other time.
>
> A request for trial setting constitutes a representation that the requesting party reasonably and in good faith expects to be ready for trial by the date requested, but no additional representation concerning the completion of pretrial proceedings or of current readiness for trial shall be required in order to obtain a trial setting in a contested case.

Rule 247 of the Texas Rules of Civil Procedure provides:

> Every suit shall be tried when it is called, unless continued or postponed to a future day or placed at the end of the docket to be called

again for trial in its regular order. No cause which has been set upon the trial docket of the court shall be taken from the trial docket for the day set except by agreement of the parties or for good cause upon motion and notice to the opposing party.

STATEMENT OF THE CASE

In the early 1970's a group of doctors decided to purchase land and build a hospital. There were two partnerships and one corporation. Houston North Properties purchased the land, Houston North Hospital Properties constructed the hospital building and Houston Northwest Medical Center, Inc., leased the land, the building and operated the hospital.

In 1979, when the hospital began to be profitable, partners in Houston North Hospital properties declared Drs. Eichelberger and Hughes retired. The Houston North Hospital Properties partners began transferring the Houston North Properties land (of which Drs. Eichelberger and Hughes remained partners) and the assets and funds of Houston Northwest Medical Center, Inc. (of which Drs. Eichelberger and Hughes were shareholders) to Houston North Hospital Properties. The partners of Houston North Hospital Properties who were partners in Houston North Properties "quitclaimed" 24.7567 acres of Houston North Properties to Houston North Hospital Properties on May 1, 1983, and sold it on the same day to H.N.M.C. Inc. for $10,784,000.00. [See Appendix H, 21a].

Drs. Eichelberger and Hughes's attempts to secure relief in the courts resulted in a judgment against them in a case Cause No. 82-32542. The judgment was fully paid by the supersedeas bond posted by Drs. Eichelberger and Hughes in 1986. "Upon receipt of the bond proceeds, the payments were allocated as agreed by the interested parties, totally satisfying HNHP's judgment . . . ". Judicial admission contained in Respondents' Motion filed in Federal District Court. [See Excerpt Appendix I, 24a].

Although the debt was fully paid, Houston North Hospital Properties and partners filed a proof of claim in both Drs. Eichelberger and Hughes's bankruptcy cases in 1987 for the debt. The District Court found the fully paid debt non-dischargeable. [Appendix D, 5a].

On November 17, 1986, while Drs. Eichelberger and Hughes' lawsuits were pending in the 295th District Court, Judge Marsha Anthony of the 334th District Court entered a postanswer default judgment for Houston North Properties and partners against Drs. Eichelberger and Hughes in Cause No. 79-26873 purportedly on a trial date given on May 8, 1986, for legal fees in cases in which Houston North Properties was not a party, the cases were dismissed without prejudice, or non-suited, or ended in a mistrial. Houston North Properties suffered no injury as required by 11 U.S.C. § 523(a)(6). A summary of tracing of the fraud in the various cases is presented for the court's consideration as Appendix J, 26a.

It is important to note that the temporary injunction filed on May 7, 1986, and granted on May 8, 1986, while Cause No. 79-2673 (Eaton case) was in trial, and the trial setting of November 17, 1983, was in Cause No. 85-26017

(Republic case). That trial date was vacated in August 1987, long before the First Court of Appeals opinion on 11/20/87. There is no mention in the Court's opinion that the district court was without jurisdiction or authority to vacate the trial setting. Cause No. 85-25994 was non-suited on 4/7/86 and pursuant to Texas Rules of Civil Procedure, ceased to be, as though never filed. The cases, Cause No. 79-26873 and No. 85-26017 were not consolidated until August 8, 1986. They were consolidated by Judge Frank O. White, of the 295th District Court with the hearings and submission dates to be rescheduled by the 295th District Court. [Appendix L, 33a]. On August 8, 1986, the trial in the consolidated cases was scheduled for February 9, 1987. [Appendix K, 30a].

1. A Judgment Entered Without Notice is Constitutionally Infirm. ***Peralta v. Heights, supra; Mullane v. Central Hanover Bank, supra; Armstrong v. Manzo, supra.***

Respondents provide no proof of a trial setting for the postanswer default judgment in Cause No. 79-26873 (Eaton case) or notice to Drs. Eichelberger and Hughes or willful malicious injury to Houston North Properties. Noticeably missing is any document or record of a trial setting or notice to Drs. Eichelberger and Hughes of a trial setting for November 17, 1986, in the Eaton case. Petitioners provided the court with a court order, dated August 8, 1986, that after granting temporary restraining orders in Cause No. 79-26873 (Eaton) and Cause No. 85026017 (Republic case) the court would reschedule all hearing and submission dates and a court order, dated August 8, 1986, granting Drs. Eichelberger and Hughes's

Motion for Temporary Injunction and Receiver, and setting the cases for trial on February 9, 1987. The injunction was sought *after a jury trial* in the Eaton case ended in a mistrial in July, 1986.

On November 17, 1986, both the Eaton and Republic cases were on the docket of the 295th District Court. Reidmueller's motion to recuse the judge of the 295th District Court was pending. It was heard and denied on November 21, 1986. The appeal of the injunctions was pending before the First Court of Appeals.

On November 20, 1986, three days after the 334th District Court purportedly called the case to trial, the First Court of Appeals vacated the injunctions and order for a receiver. [Appendix M, 35a]. The State Appellate Court, in their opinion, ignored the undisputed records with the true facts in the cases and instead relied on the fraudulent statements of Attorneys Norman Reidmueller and Mike Johnston as is proven by a comparison of the uncontroverted facts and the Court's findings.

In regards to Houston North Properties, a Texas General Partnership, of which Drs. Eichelberger and Hughes each owned 7.17%, the Court found, "The only remaining property involved here is HNP's books and business records. . . . It is patently clear to this court that the doctors' main concern with the business records is their accessibility for discovery purposes".

In regards to Houston Northwest Medical Center, Inc./Houston Northwest Medical Center Survivor, Inc., in which Drs. Eichelberger and Hughes each owned 6,818 shares of stock, the Court found, "It is clear that, without a corporation or corporate assets, the provisions of article

7.05 are inapplicable." (Article 7.05 provides for receivers for corporations).

The Court chose to ignore that on May 1, 1983, the partners of Houston North Properties who were also partners of Houston North Hospital Properties had quit-claimed 24 acres of Houston North Properties to Houston North Hospital Properties. On May 3, 1983, Houston North Hospital Properties sold the 24 acres of Houston North Properties to H.N.M.C. Inc. (no name, subsidiary of Republic Health) for $10,784,000.00 and the assets of Houston Northwest Medical Center, Inc., including the names Houston Northwest Medical Center, to H.N.M.C. Inc., for over $500,000.00. Under *Peralta, supra, Mullane, supra,* and *Manzo, supra,* the Bill of Review should be granted and the postanswer default judgment vacated.

2. Res Judicata Not Applicable in Cases of Fraud. *Brown v. Felsen, supra.* Judgment Obtained by Fraud on the Courts Is Void. *Hazel Atlas Glass, supra.*

The Fifth Circuit found no fraud on the courts for either the postanswer default judgment in No. 79-26873 or the fraudulent proof of claim in Case No. 87-03998-H5-7.

A. Fraud on the Courts in Cause No. 79-6873

Proof of the fraud perpetrated on the courts, by pleadings and sworn testimony, that HNP had no property or funds and conducted no business after 1983 and Houston Northwest Medical Center, Inc., no longer existed and had no funds is submitted with this application

and previously submitted to District and Appellate courts.

Fraud on this Court by Attorneys Reidmueller and Johnston include statements to this Court that, "Respondent Houston North Properties (HNP), a land partnership in which Petitioners were still members, had owned nothing since at least 1983. As of the summer of 1986, when the mistrial occurred, HNP had no business to conduct".

In 1987, Houston North Properties had funds in an escrow fund resulting from the H.N.M.C. Inc., sale in 1983.

The first judgment in Cause No. 79-26873, tried before a jury, found 6.250% interest in Houston North Properties to be worth $102,500.00. The judgment was signed on May 16, 1983, and approved by Norman Reidmueller. On January 20, 1987, Harold Lloyd, attorney for the Eatons, was paid $332,551.42 by Houston North Properties and Houston North Hospital Properties from escrow funds on deposit at Allied Bank of Texas, Houston, Texas. Wentworth Eaton received $101,508.68 against Houston North Properties and Houston North Hospital Properties, with the funds to remain on deposit at the Allied Bank of Texas, Houston.

In 1987, Houston North Properties filed an adversary proceeding seeking to have the postanswer default judgment debt in Cause No. 79-26873 (Eaton case), that forced Drs. Eichelberger and Hughes into bankruptcy, declared non-dischargeable. The bankruptcy court found the debt dischargeable. On appeal by HNP, the District Court found the debt non-dischargeable. The Fifth Circuit held the debt, the subject of this action, non-dischargeable.

The Fifth Circuit cited the elements for malicious prosecution but failed to note there was no previous judgment as required by element 3.

Proof of fraud on the appellate court in the appeal of the temporary injunctions dated 8/8/87 by Court Officers Reidmueller and Johnston concerning Houston Northwest Medical Center, Inc. (without a corporation and without assets) is contained in Attorney Johnston's affidavit attached to an application for garnishment filed in Cause No. 79-26873(D) in June, 1987. Attorney Johnston is seeking to garnish an account of Houston Northwest Medical Center, Inc./Houston Northwest Medical Center Survivor, Inc., containing funds in the amount of $232,000.00, belonging to Drs. Hughes and Eichelberger. A copy of the affidavit is attached as Appendix N, 45a.

The Court of Appeals vacated the injunctions on November 20, 1986. [Appendix M, 35a]. Under Texas Rules of Civil Procedure and the local rules of Harris County District Court in effect at that time, once an ancillary judge heard testimony or evidence, the case transferred to the ancillary judge's court. Texas Rules of Appellate Procedure Rule 43(a) provides in relevant part that the pendency of an appeal from an order granting interlocutory relief does not suspend the order appealed from unless supersedeas is granted. Rule 43(d) clearly provides that pending an appeal from an interlocutory order, the trial court retains jurisdiction of the cause and may issue further orders. The Court of Appeals' Opinion dated November 20, 1986, verifies that Cause No. 79-26873 is on appeal from the 295th District Court.

On March 20, 1987, the Court states, "On November 17, 1986, the 334th District Court, presided over by Judge Anthony, proceeded to trial on the three cause numbers, pursuant to her orders of May 8, 1986, setting the cases for trial and transferring all related cases to her court".

The order on May 8, 1986, was in Cause No. 85-26017 (Republic) pending in the 295th District Court. Cause No. 85-25994 was non-suited on April 7, 1986. Cause No. 79-26873 was in trial from April 7, 1986, to July 11, 1986.

The court states,

> "The two cause numbers 85-25994 and 85-26017, that concerned Eichelberger and Hughes, were reset to November 19 pending an inquiry as to the whereabouts of Eichelberger and Hughes. In the meantime, Eichelberger and Hughes filed a motion to recuse Judge Anthony and set it for hearing before her on November 21. Notwithstanding, the cases proceeded to trial on November 19, and Judge Anthony signed judgments on November 25 and December 8. These judgments purported to dispose of all matters raised by Eichelberger and Hughes, assessed damages and attorney's fees against them, and made the temporary injunction prohibiting further suits by Eichelberger and Hughes a permanent one".

If the two cases that concerned Eichelberger and Hughes were Cause No. 85-25994 (nonsuited April 7, 1986), and Cause No. 85-26017 (Eichelberger and Hughes were the plaintiffs and there was no counterclaim) were reset to November 19, 1986, why was a postanswer default judgment rendered against them on November 17, 1986 in Cause No. 79-26873? The recusal hearing on

November 21, 1986, was on Respondent's Motion to Recuse Judge White. Judge Andrews, appointed by Judge Stoval, Administrative Judge, heard the motion and denied the motion to recuse Judge White.

The court continues with its very obvious errors. The court states,

> "After this Court dissolved Judge White's interlocutory orders, on November 24, 1986, Judge White consolidated all cases remaining in Judge Anthony's court with the temporary injunction and appointment of receivership cause before him. He then proceeded to vacate all orders entered by Judge Anthony after August 4, 1986, the date that he heard the application for a temporary injunction and the appointment of a receiver".

The Court of Appeals dissolved Judge White's interlocutory orders on November 20, 1986. Judge White consolidated the two cases, Cause No. 79-26873 and Cause No. 85-26017 on August 8, 1986. He vacated the trial date of November 17, 1986, on August 8, 1986. On December 16, 1986, he vacated the orders of severance by Judge Anthony, severing the two consolidated cases, into four cases, Causes No. 79-26873, No. 79-26873A, No. 79-26873B and No. 79-26873C, vacated the judgment and granted a new trial in Cause No. 79-26873, vacated the permanent injunction in Cause No. 79-2687B and reinstated Cause No. 85-26017 on the docket. A copy of the order of December 16, 1986, is attached as Appendix O, 49a.

To date, Doctors Eichelberger and Hughes or their estates have received nothing for their interest in

Houston North Properties. Their bankruptcy creditors received the $232,000.00 plus $32,000.00 interest for their stock in Houston Northwest Medical Center, Inc.

B. Fraud in Bankruptcy Case No. 87-03998-H5-7.

The fraud committed in this case by Houston North Hospital properties is even more patently clear. In 1986, Houston North Hospital Properties collected in full the judgment in Cause No. 82-32542 from supercedeas bond proceeds. In 1987 they filed a proof of claim for the debt. They admitted in District Court the debt was fully paid [See Appendix I, 24a]. It is this debt, based on a fraudulent proof of claim that the bankruptcy court and Fifth Circuit found dischargeable and the District Court found nondischargeable under 11 U.S.C. § 523(a)(6). Under 18 U.S.C. § 152 filing a fraudulent proof of claim constitutes a federal crime not grounds for a reward.

REASONS FOR GRANTING THE WRIT

We have shown in this application for Writ of Certiorari that State Court decisions were secured by fraud on the courts, by officers of the court, and by the State and Federal appellate courts' disregard for the Constitutional rights of Drs. Eichelberger and Hughes, and those rights and laws as interpreted by this court in *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 108 S.Ct. 896 (1988) and *Hazel Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 772, 64 S.Ct. 1281 (1944).

In *Peralta,* a bill of review case, this Court in vacating the First Court of Appeals opinion after the Texas Supreme Court denied Writ of Error, held, "The holding below contravenes this Court's precedents, under which a judgment entered without notice or service violates the Due Process Clause."

In *Hazel Atlas Glass Co. v. Hartford-Empire Co.,* a bill of review of case, this Court held, "From the beginning there has existed alongside the term rule a rule of equity to the effect that under certain circumstances, one of which is after discovered fraud, relief will be granted against judgments regardless of the terms of their entry."

Here the Court can see, as in *Hazel Atlas,* a deliberate scheme to defraud not only the State Courts but federal district courts and appellate courts. Proof of the scheme, and of its complete success up to date, is shown in the State and Federal Court judgments and opinions contained in Petition Appendix and proof attached to this application.

This case presents the critical Constitutional issue of whether this Court has a mandatory, not discretionary, duty to insure that Constitutional rights and the integrity of the Court are upheld. Review by this Court is necessary to uphold uniform application of the laws as interpreted by the Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX A – REFUSAL OF APPELLANTS' APPLICATION FOR WRIT OF ERROR IN THE SUPREME COURT OF TEXAS DATED MAY 19, 1993

THE SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

May 19, 1993

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RE: Case No. D-3315

Style: P.T. EICHELBERGER, JR., M.D., and LOUIS B. HUGHES, M.D. v. JULES BALETTE, M.D., ET AL.,

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error, as supplemented, with the notation, "Writ Denied." Request for judicial notice is overruled.

Sincerely,

John T. Adams, Clerk
by s/Blanca Morin
Blanca Morin, Deputy

APPENDIX B – ORDER OF THE DISTRICT COURT OF HARRIS COUNTY, TEXAS, 334TH JUDICIAL DISTRICT DATED MAY 31, 1991

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
334TH JUDICIAL DISTRICT

NO. 90-59762

P.T. EICHELBERGER, JR. and LOUIS B. HUGHES

v.

JULES BALETTE, M.D., et al.

ORDER

On this day came on to be considered Defendant's Motion to Dismiss and the Court, upon reviewing the papers and pleadings filed herein and upon considering the arguments of counsel, is of the opinion that good cause exists for the granting of said Motion. It is accordingly

ORDERED that Defendant's Motion to Dismiss is GRANTED and this cause is DISMISSED WITH PREJUDICE. All costs of Court are taxed against Plaintiffs jointly and severally.

SIGNED this the 31st day of May, 1991.

s/Russell Lloyd
Honorable Russell P. Lloyd
Judge Presiding

APPENDIX C

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

EICHELBERGER, JR., M.D.,	X	CASE NO.
	X	87-05998-H3-11
DEBTOR,	X	(CHAPTER 11)
	X	
	X	CASE NO.
LOUIS B. HUGHES M.D.,	X	87-05226-H2-11
	X	
DEBTOR,	X	(CHAPTER 11)
	X	ADVERSARY NO.
HOUSTON NORTH	X	87-0664
HOSPITAL PROPERTIES,	X	
ET AL.,	X	
	X	
PLAINTIFFS,	X	
	X	
P.T. EITCHELBERGER, JR.,	X	
M.D., LOUIS B. HUGHES,	X	
	X	
DEFENDANTS.	X	

JUDGMENT

(Filed Aug. 30, 1989)

THE HONORABLE JUDGE OF SAID COURT:

The complaint of Houston North Hospital Properties, a Texas partnership, Houston North Properties, a Texas partnership, Houston Northwest Medical Center Survivor, Inc., a Texas corporation, and individuals Edward Roberson, M.D., William Fagan, M.D., Charles Howard, M.D., Donald Chalmers, D.D.S., C.D. Delery, M.D., C.O. Dube, M.D., Eugene Fontenot, M.D., Charles Hill, M.D., Glen Keller, M.D., E.O. Smith, M.D., for a determination of dischargeability of a November 24, 1982, judgment in

State Court, Cause No. 82-32542 entitled *Hughes, et al v. Houston Northwest Medical Center, Inc., et al.*, and a December 8, 1986 judgment in State Court, Cause No. 79-26873 entitled *Aycock, et al v. Eaton, et al.*, and for judgment having come on regularly to be heard before the Court on May 22, 1989, and notice duly and regularly served, and Plaintiffs appearing by their attorneys John Brentin and Chad Blastingame, and Defendant Louis B. Hughes appearing in person and by counsel James Girardeau, and Defendant P.T. Eichelberger, Jr. appearing in person and by counsel Reba Eichelberger, and evidence, oral and documentary, having been adduced and the matter having been argued and submitted, and good cause appearing therefor, the Court finds the judgment debts are dischargeable.

Pursuant to the Court's findings of facts and conclusions of law orally dictated into the court record and incorporated herein as though fully stated,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the judgment debts in State Court judgments Cause No. 82-32542 and Cause No. 79-26873 of Defendants to Plaintiffs are dischargeable debts under 11 USC 523(a)(6) and such debts are released by order of discharge granted herein.

SIGNED this 29 day of August, 1989.

/s/ Margaret A. Mahoney
U.S. BANKRUPTCY JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

DOUGLAS AYCOCK, *et al.*,	§	CIVIL ACTION
Plaintiffs,	§	H-89-3395
	§	
versus	§	
P.T. EICHELBERGER, JR., *et al.*,	§	
	§	
Defendants.	§	

FINAL JUDGMENT

(Filed March 16, 1992)

The judgment debts for tortious interference and malicious prosecution are nondischargeable.

Signed on March 12th, 1992, at Houston, Texas.

/s/ Lynn N. Hughes
Lynn N. Hughes
United States
District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

DOUGLAS AYCOCK, *et al.*,	§	CIVIL ACTION
Plaintiffs,	§	H-89-3395
	§	
versus	§	
P.T. EICHELBERGER, JR., *et al.*,	§	
	§	
Defendants.	§	

OPINION ON FINAL JUDGMENT

(Filed March 16, 1992)

1. *Introduction.*

P. T. Eichelberger and Louis B. Hughes filed multiple lawsuits against other doctors in two partnerships and one corporation. The parade of suits eventually led to the bankruptcies of Eichelberger and Hughes. Among other debts, the bankruptcy court discharged two debts on judgments against the debtors for malicious prosecution and tortious interference with business relations. These debts are not dischargeable.

2. *Background.*

A court action in 1975 excluded Eichelberger and Hughes from a partnership, Houston North Hospital Properties, for failing to move their medical practices to Houston Northwest Medical Center, as the partnership agreement required. Many lawsuits and appeals followed.

In 1982, a trial court held that Eichelberger and Hughes tortiously interfered with the business relations of the same partnership. The court entered judgment for $536,000 in favor of the partnership and Houston Northwest Medical Centers, Inc., for tortious interference and for prosecuting a shareholders' derivative suit without reasonable cause. In 1986, a court entered a judgment of $591,914.35 against Eichelberger and Hughes for malicious prosecution. Hughes and Eichelberger filed bankruptcy. The bankruptcy court concluded that these judgments stand, but the court also discharged the resulting judgment debts.

Houston North Hospital Properties and the other judgment creditors appeal.

Issues: (1) Are judgment debts for tortious interference dischargeable in bankruptcy?

(2) Are judgment debts for malicious prosecution dischargeable in bankruptcy?

3. *Tortious Interference.*

A bankruptcy court cannot discharge a debt for willful and malicious injury. *See* 11 U.S.C. § 523(a)(6). If the causes of action that predicate the judgments against Eichelberger and Hughes include intentional and malicious behavior, the court cannot discharge the debts.

The elements of a common law cause of action for tortious interference with business relations in Texas are:

A. The defendant acted intentionally.

B. The defendant calculated the act to damage the plaintiff.

C. The act interfered with a contract to which the defendant was not a party.

D. The act proximately caused damage to the plaintiff.

E. The defendant had no justification or excuse for the act.

See Haralson v. E. F. Hutton Group, Inc., 919 F.2d 1014, 1037 (5th Cir. 1990).

Tortious interference is an intentional tort. Intent alone does not prevent the court from discharging a judgment debt. Some torts involve a purposeful act but

not an intent to injure. These torts are dischargeable because they are not malicious. Trespass and negligent misrepresentation exemplify this class of torts.

An act is malicious when it is done intentionally and when that intention to do the act is coupled with an intention actually to injure someone, without a socially recognized interest in the context that would justify the consequent injury. Because the elements for intentional interference with business relations encompass all the ingredients of malice, the bankruptcy court cannot discharge the judgment debt on that cause of action.

4. *Malicious Prosecution.*

To recover for malicious prosecution the plaintiff must prove these elements:

A. The defendant filed a suit without probable cause.

B. The defendant was malicious.

C. The defendant lost the suit.

D. The suit damaged the plaintiff.

See Kale v. Palmer, 791 S.W. 2d 628, 633 (Tex. App. – Beaumont 1990, writ denied). Because these elements expressly include willfulness and malice, the court cannot discharge the judgment debt for malicious prosecution.

5. *Conclusion.*

The burden of proof for a discharge in bankruptcy is the same as the burden of proof in the original suit, a preponderance of the evidence. *Grogan v. Garner,* ___ U.S. ___, 111 S.Ct. 654, 659 (1991). The bankruptcy court

applied a heightened burden of proof for denial of discharge, that the wrong be proven by clear and convincing evidence. Using a preponderance of the evidence as the burden of proof, the court cannot discharge either judgment debt because both causes of action include the elements of willfulness and malice. 11 U.S.C. § 523(a)(6).

Signed on March 12th, 1992, at Houston, Texas.

/s/ Lynn N. Hughes
Lynn N. Hughes
United States
District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

DOUGLAS AYCOCK, *et al.*, Plaintiffs,	§	CIVIL ACTION H-89-3395
versus	§	
P.T. EICHELBERGER, JR., *et al.*,	§	
Defendants.	§	

ORDER
(Filed Oct. 2, 1992)

1. Eichelberger may supplement the record (#17).

2. Eichelberger's motion for a rehearing (#19) is denied.

Signed on September 28, 1992, at Houston, Texas.

/s/ Lynn H. Hughes
Lynn N. Hughes
United States
District Judge

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 92-2823

IN THE MATTER OF: P.T. EICHELBERGER, JR., M.D.

Debtor,

DOUGLAS AYCOCK, ET AL.,

Appellees,

versus

P.T. EICHELBERGER, JR., M.D., and LOUIS B. HUGHES,

Appellants.

Appeal from the United States District Court
for the Southern District of Texas

(CA H-89-3395)

(Filed Dec. 14, 1993)

Before GOLDBERG, JONES and DUHÉ, Circuit Judges.[1]

PER CURIAM:

The bankruptcy court held that two judgment debts owed the appellees by the appellants are dischargeable under the Bankruptcy Code. The first debt is a 1982

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[1] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

money judgment entered against the appellants based on their tortious interference with the appellee's contractual relations. The second debt is a 1986 money judgment entered against the appellants for malicious prosecution. On appeal, the district court reversed the bankruptcy court and held that the two judgment debts were nondischargeable under the Bankruptcy Code. Because we agree with the district court regarding the malicious prosecution judgment, we affirm the district court's ruling on that issue. However, we disagree with the district court regarding the tortious interference with contractual relations judgment and accordingly reverse the district court's ruling regarding that debt.

BACKGROUND

The history of the litigation between these parties would be unnecessarily confusing and cumbersome to set forth in full detail in this opinion. The relevant facts to this decision are that the appellees filed an adversary complaint in the bankruptcy court under 11 U.S.C. § 523(a)(6) requesting that their judgment claims against the appellants be exempt from discharge under the Bankruptcy Code. The bankruptcy court found that the appellees, the judgment creditors, had failed to prove by clear and convincing evidence that the judgment debts were nondischargeable under § 523(a)(6). On appeal, the district court held that the bankruptcy court erred in applying a heightened burden of proof and ruled, using a preponderance of the evidence standard, that the judgment debts were nondischargeable.

DISCUSSION

A.

The appellants argue that the district court erred in reversing the bankruptcy court and ruling that the judgment debts are nondischargeable under the Bankruptcy Code. This court reviews *de novo* issues of law arising in bankruptcy cases, while questions of fact are reviewed under a clearly erroneous standard. *Luce v. First Equip. Leasing Corp. (In the Matter of Luce)*, 960 F.2d 1277, 1280 (5th Cir. 1992). Where there is a factual dispute, a bankruptcy court is to determine whether a debt is nondischargeable pursuant to section 523 of the Bankruptcy Code based on a preponderance of the evidence standard.[2] *Grogan v. Garner*, 498 U.S. 279, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991); *Young v. National Union Fire Ins. Co. (In the Matter of Young)*, 995 F.2d 547, 549 (5th Cir. 1993). The bankruptcy court applied an incorrect standard – that of clear and convincing evidence – in determining the appellants' judgment debts were dischargeable under the Bankruptcy Code.[3] On appeal, the district court noted the

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[2] Section 523(a)(6) of the Bankruptcy Code provides that a discharge will not be allowed for a debt "for willful and malicious injury by the debtor to another entity or to the property of another entity." 11 U.S.C. § 523(a)(6).

[3] The bankruptcy court's judgment was delivered in 1989. The United States Supreme Court did not announce that the proper standard for determining a dischargeability issue under the Bankruptcy Code was a preponderance of the evidence standard until 1991. *Grogan v. Garner*, 498 U.S. 279, 111 S.Ct. 654 (1991). However, the standard enunciated in *Grogan* is to be applied retroactively. *Luce v. First Equip. Leasing Corp. (In the Matter of Luce)*, 960 F.2d 1277, 1281 (5th Cir. 1992).

proper standard – preponderance of the evidence – but whether it relied on that standard and evaluated facts to reach its conclusion is not clear.

It appears that dischargeability in this case is a matter of law rather than fact, because it turns on whether facts found by the state court, which have collateral estoppel effect here, amounted to findings of willful, malicious conduct under § 523(a)(6). We agree with the district court regarding the malicious prosecution judgment. However, we disagree with the court regarding the tortious interference with contractual relations judgment.

Malicious Prosecution

In Texas, to recover for the intentional tort of malicious prosecution, the plaintiff must prove that:

(1) the defendant filed a suit without probable cause;

(2) the defendant was malicious;

(3) the defendant lost the suit; and

(4) the suit damaged the plaintiff.

Kale v. Palmer, 791 S.W.2d 628, 633 (Tex. App. – Beaumont 1990, writ denied). Because these elements expressly include intent and malice, the district court correctly reasoned that the bankruptcy court could not discharge the judgment debt for malicious prosecution.

Tortious Interference with a Contractual Relationship

In Texas, to recover for tortious interference with a contractual relationship, the plaintiff must show:

(1) the defendant acted intentionally;

(2) the defendant calculated the act to damage the plaintiff;

(3) the act interfered with a contract to which the defendant was not a party;

(4) the act proximately caused damage to the plaintiff; and

(5) the defendant had no justification or excuse for the act. *Haralson v. E.F. Hutton Group, Inc.*, 919 F.2d 1014, 1037 (5th Cir. 1990).

The district court stated that the judgment against appellants was based on tortious interference with a *business* relationship. He probably drew this conclusion because appellees contended, as they do here, that this was the cause of action. Actually, the judgment was based on tortious interference with a *contractual* relationship. Under Texas Law, these two torts are virtually identical, with one exception. Interference with a business relationship requires that malice be shown as an element of the tort; interference with a contractual relationship does not. *Deauville Corp. v. Federated Dep't Stores, Inc.*, 756 F.2d 1183, 1196 (5th Cir. 1985) (interpreting Texas law). This difference is important in appellants' bankruptcy case because when malice is an element of the tort, then the debt should be nondischargeable under § 523(a)(6) of the Bankruptcy Code. For a debt to be nondischargeable, it must result from an act that is both intentional and malicious. In the suit against appellants, the jury was not required to find that the appellants acted maliciously when finding them liable for tortious interference with a contractual relationship. (see Plaintiff's Exhibit 4).

Because malice was not shown, this debt is dischargeable under § 523(a)(6) of the Bankruptcy Code.

B.

The appellants next argue that the state court judgments are not reliable because they are based on "fraud on the courts" and other inappropriate behavior by the appellees. The appellants argue that the judgments are so unreliable as not to support a finding of nondischargeability under the Bankruptcy Code. The appellants wish to relitigate the facts upon which the two judgments are based. Because we have found the tortious interference judgment dischargeable, it is not necessary to address the appellants' complaints regarding that judgment. However, we will address arguments relating to the malicious prosecution judgment.

The judgment based on malicious prosecution was entered by post-answer default judgment. The appellants' defense was dismissed with prejudice. The law presumes that judgments are valid on their face. *Phillips v. State Farm Mut. Auto. Ins. Co.*, 437 F.2d 365 (5th Cir. 1971). Collateral estoppel is appropriate in bankruptcy dischargeability cases to avoid relitigation of issues already resolved in state court. *Grogan v. Garner*, 498 U.S. ___, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991). Where the record of the state proceeding reflects " 'specific false-pretense conduct, by which the federal bankruptcy court might determine the creditor's claim for nondischargeability, measured by federal bankruptcy standards' collateral estoppel can be applied to a default judgment." *Lacy v. Dorsey (In Re Lacy)*, 947 F.2d 1276, 1277 (5th Cir. 1991)

(quoting *Harold v. Simpson and Co. v. Shuler (In the Matter of Shuler)*, 722 F.2d 1253, 1256 (5th Cir. 1984)).

The bankruptcy court considered the evidence presented regarding the unreliability of the state court judgment, including examining the appellate records, and determined that collateral estoppel was appropriate. The bankruptcy court ruled that that judgment was in fact not a default judgment, although the appellant did not appear at trial, because the appellant had an opportunity to litigate the matter and chose not to do so. There is no evidence that the appellees have unclean hands, have perpetrated fraud on the courts, or have filed fraudulent proofs of claim. For these reasons, the decision of the lower courts on this issue will not be disturbed.

C.

The appellants' last argument is that they are entitled to a jury trial on the merits of their claims and defenses. That is wrong, because any claims or defenses that the appellants were entitled to raise were barred as a matter of law, as discussed above.

CONCLUSION

For these reasons, the ruling of the district court finding the malicious prosecution judgment non-dischargeable is affirmed. However, the judgment for tortious interference with contractual relations is dischargeable, so we accordingly reverse the district court on that issue. The case must be remanded to the bankruptcy court for entry of a judgment consistent herewith.

AFFIRMED in part; **REVERSED** in part; **REMANDED** with Instructions.

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-2823

IN THE MATTER OF:
P.T. EICHELBERGER, JR., M.D.,

Debtor.

DOUGLAS AYCOCK, ET AL.,

Appellees,

versus

P.T. EICHELBERGER, JR., M.D.,
and LOUIS B. HUGHES,

Appellants.

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING

(Filed Jan. 20, 1994)

Before GOLDBERG, JONES and DUHÉ, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ Edith H. Jones
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL
RULES 41 FOR STAY
OF THE MANDATE.

REHG-4

90 days to appeal S.Ct.

APPENDIX H

QUITCLAIM DEED

THE STATE OF TEXAS	§	KNOW ALL MEN. BY
	§	THESE PRESENTS:
COUNTY OF HARRIS	§	(Filed May 3, 1983)
	§	

THAT HOUSTON NORTH PROPERTIES, a Texas general partnership ("Grantor") of Harris County, Texas, for and in consideration of the sum of Ten and No/100 dollars and other good and valuable consideration in hand paid by the grantee herein named, the receipt and sufficiency of which are hereby acknowledged, has released, revised and quitclaimed and by these presents does hereby release, revise and quitclaim unto HOUSTON NORTH HOSPITAL PROPERTIES, a Texas general partnership, whose mailing address is 710 F.M. 1960 West at Hafer Road, Suite K, Houston, Texas, Attention: Charles Howard M.D., all of Grantor's right, title and interest in and to the following described real property in Harris County, Texas (the "Property"), to-wit:

> A tract of land containing 34.7567 acres out of the Daniel Illegible Survey, A-315 and the Christopher Walter Survey, 568, Harris County, Texas; said 24.7567 acres of land encompasses reserves "L", "E", "F", "K", "M"; "C" and part of Reserve "D-1" as well as street right-of-way areas adjacent to these said reserves and in addition street right-of-way areas adjacent to reserves "D" and "E" of Houston Northwest Medical Center, an unrecorded plat of 56.1363

acres of land by Coulson & Associates Engineers, Inc., Houston, Texas; said 24.7567 acres of land being more particularly described by metes and bounds on Exhibit A attached hereto and made a part hereof for all purposes,

TO HAVE AND TO HOLD all of Grantor's right, title and interest in and to the Property unto Houston North Hospital Properties, its successors and assigns forever, so that neither Grantor nor its successors or assigns shall have, claim or demand any right of title to the Property, premises, appurtenances or any part thereof.

EXECUTED this 1st day of May, 1993.

HOUSTON NORTH PROPERTIES

Jules Balette
Jules Balette, M.D.,
General Partner

/s/ Donald Chalmers
Donald Chalmers, D.D.S.,
General Partner

James Davis
James Davis,
General Partner

/s/ C.D. Delery
C.D. Delery, M.D.
General Partner

/s/ C.O. Dube
C.O. Dube M.D.,
General Partner

Eichelberger
Phillip Eichelberger, Jr.,
M.D., General Partner

/s/ William Fagan
William Fagan, M.D.,
General Partner

/s/ Eugue Fontenot
Eugene Fontenot, M.D.,
General Partner

/s/ Charles Hill
Charles Hill, M.D.,
General Partner

Louis Hughes
Louis Hughes, M.D.,
General Partner

/s/ Charles Howard
Charles Howard, M.D.,
General Partner

/s/ Glen Keller
Glen Keller, M.D.,
General Partner

/s/ Edward Roberson
Edward Roberson, M.D.,
General Partner

/s/ E.O. Smith
E.O. Smith, M.D.,
General Partner

APPENDIX I

* * *

interest for the non-covered time, and that HNHP is not claiming anything for the interest accruing on the $412,000.00 Appellee attributes exclusively to HNHP. The accrued post-judgment interest beyond the supercedes bond constitutes the claim of Survivor, Inc. Upon receipt of the bond proceeds, the payments were allocated as agreed by the interested parties, totally satisfying HNHP's judgment and leaving a portion of the Survivor, Inc. judgment unsatisfied. This allocation is obvious to Appellee from the absence of an HNHP claim in bankruptcy arising from the first judgment, but Appellee chose to distort the facts to create an allegation of fraud and usury.

6. Paragraph 12 of the Statement of Facts purports that the sale of the hospital did not occur in 1982 because of lack of agreement. The sale failed in 1982 due to the Appellee's interference. The escrow was established because of the unfounded claims of Appellee and the caution attendant to a major transaction. It was absolutely no indication of the accuracy of the claims of Appellee, in fact it represented an additional damage to Appellants, because these funds were tied up rather than distributed to Appellants as they should have been and would have been, but for Appellee's interference.

7. In paragraph 14, Appellee admits that his intervention in 79-26873 was non-suited when he became dissatisfied with the judge's discovery rulings (forum

shopping). He filed another intervention the same day he dismissed Cause Number 79-26873.

* * *

APPENDIX J

Exhibit 13

TRACING OF FRAUD ON THE COURTS AND BANKRUPTCY FRAUD, CONSPIRACY AND COLLUSION IN CAUSE NO. 79-26873, AYCOCK V. EATON

PARTIES

Plaintiffs	Houston North Properties and partners Houston North Hospital Properties and partners
Defendant	Partner Wentworth Eaton and wife
Intervenors	P. T. Eichelberger, Jr., and Louis B. Hughes

C/A AGAINST HUGHES & EICHELBERGER

1. Breach of fiduciary duty for intervening in two suits, Cause No. 79-26873 (*Aycock v. Eaton*) and Cause No. 82-53331 (*Balette v. Roberson*)
2. Filing lawsuits against partners for converting partnership and corporate land and assets for $78,000,000.00 in May, 1983, Medicare fraud seeking accounting and settlement of partnership and corporate affairs.

DAMAGE SOUGHT

1. Legal fees

CAUSE NO. 79-26873

1. Trial – April 7, 1986 through August 7, 1986
   4/7/86 – Intervenors non-suit after "stonewall" in discovery (R.) denied continuance (R.)
   Trial on claims against Intervenors and Defendant
2. 6/27/86 – Plaintiffs and Defendant begin negotiations

FRAUD ON COURT

1. Plaintiff Houston North Properties seeks attorneys' fees for appeal of Cause No. 82-32542 to U.S. Supreme Court.
   Houston North Properties was not a party.
2. Houston North Hospital Properties not awarded attorneys fees in state district or appeallate court.

INTERVENORS' CLAIMS DISMISSED WITHOUT PREJUDICE

1. Houston North Properties attorneys fees for federal suit, Cause No. 85-2812, Fifth Circuit Cause No. 86-2002. Houston North Hospital Properties and partners not awarded attorneys fees; suit against partners dismissed without prejudice – appellate court.
2. Partners request for attorneys fees for same matters in jury charge denied.
   PERJURED EVIDENCE – Houston North Properties was not a party

INTERVENORS CLAIMS DISMISSED WITHOUT PREJUDICE-NO ATTORNEYS FEES

1. Houston North Properties seeks attorneys fees in Cause No. 82-53331 (*Balette v. Roberson*). In a two-day hearing before Judge Tennant, after extensive argument by counsel Johnston, Intervenors' claims were stricken without prejudice. Case scheduled for trial May 16, 1988.
   PERJURED EVIDENCE – Houston North Properties and Houston North Hospital Properties were not parties. Counsel Riedmueller not an attorney of record in the case.

INTERVENORS NON-SUITED – NO ATTORNEYS' FEES REQUIRED OR AWARDED

1.Cause No. 85-25994 – trespass to try title suit for unlawful possession of land.

INTERVENORS CLAIMS NON-SUITED 4/7/86

1. INTERVENORS intervention in Cause No. 79-26873 *Aycock v. Eaton*

PENDING TRIAL

1. Cause No. 85-26017 – INTERVENORS claims against possessors of land acquired by quitclaim deed filed 4/85, randomly assigned to 295th Judicial District Court. On 4/7/86 amended to include INTERVENORS claims from Cause No. 79-26873 and Cause No. 85-25994.
2. Trial ends 8/7/86, mistrial, 7-5 in favor of INTERVENORS. Next trial date – 2/9/87 by 295th Judicial District Court.

JUDGMENT – 11/7/86

1. Cause No. 79-26873 (*Aycock v. Eaton*) judgment entered without notice to INTERVENORS, called to trial – post answer default judgment rendered for attorneys fees based on statement for legal fees entered in evidence during 4/86 trial.
   PERJURED EVIDENCE
   (1) Falsification of government documents
   (2) Trial called pursuant to trial date set for 5/8/86 in temporary injunction – there was no temporary injunction on 5/8/86 – case was already in trial.
   (3) Intervenors were not notified.
   (4) Fraudulent fee statements authenticated by counsel Riedmueller and Johnston.

DOCKET SHEETS

1. November 24, 1986, docket sheets back dated to 11/17/86 – 11/19/86 to include what attorneys have written or dictated to Judge Anthony.
   Perjured evidence – Falsification of government document and backdating 11/17/86 – false entries re: Reinette Marek's presence at hearing.

STATEMENT OF FACTS

P.75 Mr. Johnston: "Judge I put the docket sheet on the bench there, and I think that it would be appropriate to go back there, and I think it would be appropriate to go back and to include on the docket sheet the matters that were ordered by the Judge on Monday and on Wednesday.

. . .

The Court: Can we remember all that?

P.90 L.6-7 The Court: Now do you all want to make, what I'm going to ask you all to do is that you all make the list of what you want on the docket sheet,

. . .

PERJURED EVIDENCE – Falsifications of government documents, conspiracy and collusion

PROOFS OF CLAIMS

APPENDIX K

TEMPORARY INJUNCTION ORDER OF THE DISTRICT COURT OF HARRIS COUNTY, TEXAS, 295TH JUDICIAL DISTRICT DATED AUGUST 8, 1986

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
295TH JUDICIAL DISTRICT

No. 79-26873

Aycock, et al

VS.

Eaton, et al

TEMPORARY INJUNCTION ORDER

On the 6th day of August, 1986, Movants Drs. L. B. Hughes and P. T. Eichelberger, Jr., in this cause, for a temporary injunction, and other relief, came on regularly for hearing this day, due notice having been given. All parties appeared in person or by their attorneys. On duly considering the evidence received and the argument of counsel, the Court finds and concludes that movants will probably prevail on the trial of the causes.

Defendants partners of Houston North Properties, a Texas General partnership, Houston North Properties, and its agents, employees and attorneys, herein intend to disburse, misapply and waste the assets and funds of Houston North Properties, immediately and as soon as possible and before the Court can render judgment in this cause, thereby altering the status quo and tending to make ineffectual a judgment in favor of Dr. Hughes and Eichelberger, in that funds and assets of Houston North Properties will be wasted, disbursed and/or misapplied;

and unless Defendant partners of Houston North Properties, Houston North Properties, its agents, employees and attorneys, are deterred from carrying out that intention, Movants Hughes and Eichelberger will be without any adequate remedy at law in that assets of Houston North Properties will be wasted, disbursed, and/or misapplied. The Houston North Properties partnership has had no regular partnership meetings, or held any management committee meetings since February, 1980. The books, records, and documents have been removed from the business office listed in the partnership agreement. The Houston North Properties partnership is in a state of dissolution and termination. Drs. Hughes and Eichelberger are general partners in Houston North Properties.

It is therefore ORDERED that Defendant Partners of Houston North Properties, Houston North Properties, its agents, employees and attorneys, be and are, hereby commanded forthwith to desist and refrain from:

1. Disbursing, spending, wasting, or conveying any and all assets, securities, funds, and monies in their possession or under their control, directly or indirectly received now or in the future, by Houston North Properties.
2. Transferring, secreting, altering, and/or destroying any books, records, papers and/or documents of Houston North Properties.
3. Obligating, pledging, offering guarantees, or indebting Houston North Properties in any manner until final judgment in this cause is entered by this Court after trial on the merits.

It is further ORDERED that trial on the merits of this cause is ordered set for 9th day of February, 1987.

The clerk shall forthwith on the filing by movants Hughes and Eichelberger of the bond hereinafter required, and on approving the same according to the law, issue a temporary injunction in conformity with the law and the terms of this ORDER. This Order shall not be effective unless and until Movants Hughes and Eichelberger execute and file with the Clerk a bond, in conformity with the law, in the amount of Five Thousand Dollars ($5000.00) in Cause No. 79-26873.

SIGNED THIS 8th day of August, 1986.

s/Frank O. White
ANCILLARY PRESIDING JUDGE

APPENDIX L – ORDER OF THE DISTRICT COURT OF HARRIS COUNTY, TEXAS, 295TH JUDICIAL DISTRICT DATED AUGUST 8, 1986

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
295TH JUDICIAL DISTRICT

No. 79-26873
No. 85-26017

No. 79-26873

Aycock, et al

vs.

Eaton, et al

No. 85-26017

Eichelberger, et al vs. Republic Health, et al

ORDER

IT IS HEREBY ORDERED, pursuant to Harris County District Courts Local Rule, that Cause No. 79-26873 and Cause No. 85-26017, were transferred to the 295th Judicial District Court of Harris County, Texas, effective August 4, 1986. This Court having heard oral testimony on a Temporary Restraining Order and having granted such relief in Cause No. 79-26873 and Cause No. 85-26017, on August 4, 1986.

IT IS FURTHER ORDERED that all hearing dates and submission dates in Cause No. 26873 and Cause No.

85-26017 will be rescheduled by the 295th Judicial Court of Harris County, Texas.

SIGNED: August 8, 1986

s/Frank O. White
JUDGE FRANK O. WHITE
Ancillary Judge.

APPENDIX M – OPINION OF THE COURT OF APPEALS FIRST SUPREME JUDICIAL DISTRICT

COURT OF APPEALS
FIRST SUPREME JUDICIAL DISTRICT

NO. 01-86-0665-CV

HOUSTON NORTH PROPERTIES, ET AL.,

APPELLANTS

V.

P.T. EICHELBERGER, JR., M.D., AND LOUIS B. HUGHES, M.D.,

APPELLEES

On Appeal from the 295th District Court of Harris County, Texas
Trial Court Cause No. 79-26873 (cons.)

This is an appeal from interlocutory orders enjoining disbursement of partnership and corporate assets and appointing a receiver over them.

In July of 1971, several individuals executed a partnership agreement to form a Texas general partnership called Houston North Properties ("H.N.P."). Later, HNP acquired a 57 acre tract of land in northwest Houston.

The original partners of HNP formed a second partnership, Houston North Hospital Properties ("HNHP"), which purchased 11 acres from HNP for construction of a hospital and medical center, i.e., the Houston Northwest Medical Center. A third entity, Houston Northwest Medical Center, Inc. ("HNMC"), was formed to manage the hospital. All three entities had essentially the same owners, including appellees, Doctors P.T. Eichelberger, Jr. and Louis B. Hughes ("the doctors"). HNHP is not a

party to this suit, and HNMC was dissolved and became known as Houston Northwest Medical Center Survivor, Inc. ("the corporation").

In 1974, because of severe financial difficulties, HNHP permitted eight new investors to purchase a 1% ownership interest in HNHP. These new partners did not assume the existing liabilities of HNHP and were not required to practice at the clinic or use the hospital. This exemption to the new investors apparently caused internal problems, and by 1983, HNHP had been sold to Republic Health Corporation along with all of HNP's remaining acreage.

This case comes to us with a lengthy litigious history. Portions of the parties' dispute have been resolved in *Hughes v. Aycock, et al.*, 598 S.W. 2d 370 (Tex. Civ. App. – Houston [14th Dist.] 1980, writ ref'd n.r.e.), and in *Hughes v. Houston Northwest Medical Center, Inc.*, 680 S.W. 2d 838 (Tex. App. – Houston [1st Dist.] 1984, writ ref'd n.r.e.), *cert. denied*, 106 S. Ct. 571 (1985).

Before us, however, is the single question of whether the trial court abused its discretion in either granting a temporary injunction or appointing a receiver, or both.

This dispute commenced when the doctors brought suit against Republic Health Corporation as purchaser of the remaining 24 acres of HNP property (Cause No. 85-26017, "the Republic Health case"), claiming that Republic Health Corporation was not a good faith purchaser of the property. The doctors also filed suit against the managing partners of HNP and HNHP alleging fraudulent conveyances of HNP property and requesting an accounting (Cause No. 85-25994). Intervention was

also sought in both Cause No. 82-53331 and in Cause No. 79-26873, "the Eaton case."

The Eaton case involved a suit by HNP, HNHP, and most of the partners against the Eatons for breach of the partnership agreements. It was consolidated with the doctors' lawsuit in Cause No. 85-25994. The consolidated cases went to trial in the 334th District Court on April 4, 1986. During the trial, the doctors nonsuited their claims, alleging as the basis their inability to make adequate discovery. The counterclaims, which remained against the doctors, were tried to a jury, which was unable to render a verdict.

On April 7, 1986, the same day the doctors nonsuited their claims in the Eaton case, they filed an amended petition in the Republic Health case, then pending in the 295th District Court, bringing in most of the former partners, also parties to the Eaton case, as well as some new parties. In May 1986, when the amendment was discovered, the partners counterclaimed for injunctive relief from further litigation harassment. This injunction was granted by the 334th District Court on May 8, 1986, in Cause No. 85-26017 and no appeal was taken.

Pursuant to Harris County local rules requiring that a case be transferred to the court granting injunctive relief, the Republic Health case was transferred from the 295th District Court to the 334th District Court, the same court in which the Eaton case was pending. The 334th District Court then set the case for trial on November 17, 1986.

On August 4, 1986, the doctors filed a motion for the appointment of a receiver and for a temporary injunction. The motions were heard on August 6 by the 295th District

Court, which on that date was the designated court to hear ancillary matters. The judge granted the doctors' request for a temporary injunction, prohibiting appellants from: (1) disbursing the assets of HNP and the corporation; (2) transferring or destroying any books or records of both entities; and (3) obligating or indebting either entity in any manner until final judgment. The court also granted the doctors' request for the appointment of a receiver to take charge of all of the funds, assets, and securities of both entities, retained exclusive jurisdiction of the Republic Health case, and set it for trial on February 9, 1987. Finally, the court consolidated the Republic Health case with the Eaton case and transferred the Eaton case to the 295th District Court.

In their first point of error, appellants contend that there was no evidence to support the appointment of a receiver of the HNP partnership assets. Specifically, appellants assert that there is no evidence identifying any HNP asset and no evidence that any HNP asset is in present danger of being lost, removed, or materially injured. We agree.

Tex. Civ. Prac. & Rem. Code sec. 64.001 (Vernon 1986) provides:

> (a) A court of competent jurisdiction may appoint a receiver:
>
> . . .
>
> (3) in an action between partners or others jointly owning or interested in any property or fund;
>
> . . .

> (b) Under subsection (a) (1), (2), or (3), the receiver may be appointed on the application of the plaintiff in the action or another party. The party must have a probable interest in or right to the property or fund, and the property or fund must be in danger of being lost, removed, or materially injured.

The appointment of a receiver is a harsh remedy that should only be exercised in extraordinary circumstances. *Parness v. Parness*, 560 S.W.2d 181, 182 (Tex. Civ. App. – Dallas 1977, no writ); *Hughes v. Marshall National Bank*, 538 S.W. 2d 820, 824 (Tex. Civ. App. – Tyler 1976, writ dism'd). Only where the evidence shows that some serious injury to the applicant will result or is threatened will this drastic remedy be applied. *Id.* Furthermore, under the provisions of the statute, trial courts are without authority to appoint a receiver unless there is proof of a present danger of the subject property being lost, removed, or materially injured. *Hughes v. Marshall National Bank*, 538 S.W.2d at 824.

In the instant case, there is no showing that if a receiver is not appointed, HNP property will be lost, removed, or materially injured. Dr. Eichelberger testified that he and Dr. Hughes each own a 1/15th interest in the HNP partnership. The sole real estate owned by HNP, the 57 acre tract purchased in 1971, has been sold, with the sale of the last 25 acres in 1983. Since that time the partnership has been in a state of dissolution.

Regarding other assets and funds, Dr. Eichelberger testified that it was his "belief" HNP funds were being

used to pay legal and accounting fees without authorization. However, there was no evidence that any such payments were currently being made, nor any evidence that payments previously authorized by the Management Committee were made in derogation of the Partnership Agreement.

Finally, the doctors argued that they feared that attorney's fees would be paid from HNP assets pursuant to the recent trial in the Eaton Case. Again, only mere assertions were made, with no proof being presented that such fees were being paid or were contemplated.

The only remaining property involved here is HNP's books and business records. The doctors testified that these records had been moved from the ordinary place of business to the offices of Mr. Fox, the accountant for HNP. Dr. Eichelberger testified that he and Dr. Hughes had been denied access to the records except for one recent occasion.

It is patently clear to this Court that the doctors' main concern with the business records is their accessibility for discovery purposes. However, Tex. Civ. Prac. & Rem. Code sec. 64.001 does not authorize the appointment of a receiver for the inspection and copying of business records. *Hughes v. Marshall National Bank,* 538 S.W. 2d at 825. There is no evidence that the HNP business records were in danger of being lost, removed, or destroyed while in the possession of the HNP accountant. The Texas Rules of Civil Procedure provide other, and more appropriate, means for the protection and preservation of business records as evidence. *Id.*

We sustain appellants' first point of error.

In their second point, appellants assert that there was no evidence to support the appointment of a receiver over the corporation's assets.

The doctors assert that the appointment of a receiver over the corporation was made pursuant to both the Texas Civil Practice & Remedies Code and the Texas Business Corporation Act.

Tex. Civ. Prac. & Rem. Code sec 64.001(a)(5) (Vernon 1986) provides that a court may appoint a receiver "for a corporation that is insolvent, is in imminent danger of insolvency, has been dissolved, or has forfeited its corporate rights." No evidence was presented that brings this case within the requirements of section 64.001(a)(5).

Similarly, we find no evidence supporting the doctors' contention that the Tex. Bus. Corp. Act. Ann. art. 7.05 (Vernon 1986) is applicable. Dr. Eichelberger testified that both he and Dr. Hughes each owned 6,818 shares in HNMC; that the last shareholder's meeting was held in 1982, at which time the dissolution of HNMC was commenced, and that they each refused to cash their checks representing payment for their entire interest in HNMC. It is clear that, without a corporation or corporate assets, the provisions of article 7.05 are inapplicable.

We hold that the doctors' claim regarding the adequacy of the distribution of corporate assets can be satisfied by a money judgment.

We sustain appellants' second point of error.

In points of error three through five, appellants argue that the trial court erred in granting the injunction because the doctors failed in their burden of proving: (1)

that they had a probable right of recovery; (2) that there was lacking an adequate remedy at law; and (3) that there was probably injury in the interim.

At a hearing on an application for a temporary injunction, the sole issue before the court is whether the applicant is entitled to preservation of the status quo pending a trial on the merits. "Status quo" has been defined as the last, actual, peaceable, non-contested status that preceded the pending controversy. *State v. Southwestern Bell Telephone Co.*, 526 S.W. 2d 526, 528 (Tex. 1975); *Janus Films, Inc. v. City of Fort Worth*, 163 Tex. 616, 358 S.W. 2d 589 (1962).

To warrant issuance of a temporary injunction, the applicant must plead a cause of action and show a probable right on final trial to the relief sought and probable injury in the interim. *State v. Southwestern Bell Telephone, Co.*, 526 S.W. 2d at 528; *David v. Bache Halsey Stuart Shields, Inc.*, 630 S.W. 2d 754, 756 (Tex. App. – Houston [1st Dist.] 1982, no writ). The applicant must further show that no adequate legal remedy exists.

Once the applicant has established a probable right and probable injury, the determination of whether to issue a temporary injunction is within the sound discretion of the trial court. *Transport Company of Texas v. Robertson Transports*, 152 Tex. 551, 261 S.W. 2d 549 (1953); *Parks v. U.S. Home Corp.*, 652 S.W. 2d 479, 485 (Tex. App. – Houston [1st Dist.] 1983, writ dism'd). In determining whether there has been an abuse of discretion, this Court must draw all inferences from the evidence in the light most favorable to the trial court's judgment. *David v. Bache Halsey Stuart Shields, Inc.*, 630 S.W. 2d at 757.

In the instant case, nothing in the record indicates that there would be irreparable injury to the doctors if HNP and the corporation are allowed to continue their business as usual. No land remains in HNP's possession, and a disposition of the liquid assets remaining undistributed will not prejudice the doctors' chances of recovery on their primary cause of action. Therefore, we do not reach the question of whether the granting of the temporary injunction was an abuse of discretion, because the doctors have failed to establish their case as a matter of law. *Transport Company of Texas v. Robertson Transports*, 152 Tex. at 556, 261 S.W. 2d at 552. In fact, there is no evidence of any disbursement of funds for any reason after 1983. Consequently, there is no showing of irreparable harm.

In order for a legal remedy to be adequate, it must give the applicant complete, final, and equal relief. *David v. Bache Halsey Stuart Shields, Inc.*, 630 S.W. 2d at 756. Each of the injuries alleged by the doctors in their pleadings can be readily satisfied by money damages. Accordingly, we conclude that it was an abuse of the trial court's discretion as a matter of law to grant the temporary injunction. We sustain appellants' third, fourth, and fifth points of error.

Because of our disposition of points of error one through five, we will not address points of error six through ten, which argue alternate reasons why the trial court erred in both granting the temporary injunction and

appointing a receiver. Both orders of the trial court are vacated, and the cause is remanded.

s/ Kenneth M. Hoyt
Kenneth M. Hoyt
Justice

Do not publish, Tex. R. App. P. 90.

Justices Duggan and Levy sitting.

Houston. db

Judgment rendered and opinion delivered November 20, 1986

True Copy Attest:
s/ Kathryn Cox
Clerk of Court

APPENDIX N

NO. 79-26873-D
(Consolidated with Cause Nos. 85-26017 & 85-25994)

DOUGLAS AYCOCK, M.D., ET AL.	§	IN THE DISTRICT COURT OF
PLAINTIFFS	§	HARRIS COUNTY, TEXAS
VS.	§	334TH JUDICIAL DISTRICT
WENTWORTH G. EATON, M.D., ET AL.	§	
DEFENDANT	§	
AND	§	
LOUIS D. HUGHES, M.D., and PHILLIP T. EICHELBERGER, JR., M.D. ET AL.	§	

[Filed April 16, 1987]

APPLICATION FOR WRIT OF GARNISHMENT AFTER JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, EDWARD ROBERSON, M.D., ET AL., Plaintiffs, who are cognizant of the matters recited herein, and make this their application for issuance of a Writ of Garnishment against TEXAS COMMERCE BANK - Houston, as Garnishee.

I.

Garnishee, TEXAS COMMERCE BANK – Houston, may be served with said Writ of Garnishment at 712 Main Street, Houston, Harris County, Texas.

II.

Plaintiff has heretofore in this Court instituted suit against WENTWORTH G. EATON, M.D., ET AL. and LOUIS B. HUGHES, M.D., and PHILLIP T. EICHELBERGER, JR., M.D., Defendants, in Cause No. 79-26873; and on December 8, 1986, Plaintiffs obtained a judgment, jointly and severally, against LOUIS B. HUGHES, M.D., and PHILLIP T. EICHELBERGER, JR., M.D., as Defendants, for the sum of FIVE HUNDRED NINETY THOUSAND THREE HUNDRED FOURTEEN AND 35/100 DOLLARS ($590,314.35) plus interest at the rate of ten (10%) percent per annum from December 5, 1986, until paid in full and costs of Court. Said judgment is valid and existing, and remains wholly unsatisfied. Within Plaintiff's knowledge, defendants have no property in their possession within this state subject to execution sufficient to satisfy such judgment. The garnishment applied for is not sued out to injure either the Defendants, LOUIS B. HUGHES, M.D., and PHILLIP T. EICHELBERGER, JR., M.D., or the Garnishee, TEXAS COMMERCE BANK – Houston.

III.

Plaintiff has good reason to believe, and does believe, that said Garnishee, TEXAS COMMERCE BANK –

Houston, is holding money or effects belonging to Defendant, PHILLIP T. EICHELBERGER, JR., M.D. and LOUIS B. HUGHES, M.D. Said money or effects are in the form of an account set up in the name of Houston Northwest Medical Center Survivor, Inc. account number 0801407 and contains money that has been designated as belonging to PHILLIP T. EICHELBERGER, JR., M.D. and LOUIS B. HUGHES, M.D.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays for a Writ of Garnishment – against TEXAS COMMERCE BANK – Houston, Garnishee, and for such other relief to which Plaintiffs, EDWARD ROBERSON, M.D., ET AL., may show themselves justly entitled.

Respectfully submitted,

SULLINS, JOHNSTON,
ROHRBACH & MAGERS

By: /s/ Mike Johnston
MIKE JOHNSTON,
TBA #10840500
3703 Kirby Drive,
Suite 1230
Houston, TX 77098
(713) 521-0221

COUNTY OF HARRIS §

BEFORE ME, the undersigned authority, on this day personally appeared MIKE JOHNSTON, who being first duly sworn stated that he is attorney in fact for the party applying for this Writ of Garnishment and that he is duly authorized to make this Affidavit, and he is cognizant of

the matters therein stated; that he has read the foregoing Application for Writ of Garnishment against TEXAS COMMERCE BANK – Houston and that the allegations therein are true and correct.

/s/ Mike Johnston
MIKE JOHNSTON

SUBSCRIBED AND SWORN TO BEFORE ME on this 16th day of April, 1987.

/s/ Michelle C. Tucker
NOTARY PUBLIC In and For
The State of Texas

Printed Name:
Michelle C. Tucker

My Commission
Expires: 6-30-90

APPENDIX O

NO. 79-26873
NO. 85-26017
(CONSOLIDATED)
RENUMBERED AS CAUSE NO. 79-26873(A)(B)(C)

DOUGLAS AYCOCK, M.D., ET AL PLAINTIFFS	X	IN THE DISTRICT COURT OF
VS.	X	HARRIS COUNTY, TEXAS
WENTWORTH G. EATON, M.D., ET AL DEFENDANT	X	295TH JUDICIAL DISTRICT
AND	X	
P.T. EICHELBERGER, JR., M.D., ET AL	X	

ORDER

On this 16th day of December, 1986, in preparation for pretrial and trial proceedings in Cause No. 79-26873 consolidated with Cause No. 85-26017, and any other claim or part that may be renumbered so Cause No. 79-26073(A)(B)(C), this Court finds that although this Court has previously vacated certain judgments, dismissals, orders and severances granted by Judge Marsha Anthony in these causes and granted a motion for new trial in cause numbered Cause No. 79-26873(B), and reinstated Cause No. 79-26873(C), a great deal of uncertainty and confusion exists in these causes. This Court, after consideration of the facts, pleadings and argument offered in said causes, and finding that the motions to vacate orders, motions for new trial, and motion to reinstate a dismissed cause were timely filed, and that

although this Court's orders were made during its plenary power over the causes, finds it necessary to make the following orders in Cause No. 79-26873 consolidated with Cause No. 85-26017, and any part or claim that may be renumbered as Cause No. 79-26873(A)(B)(C).

IT IS THEREFORE ORDERED:

1. Orders of severance in Cause No. 79-26873 consolidated with Cause No. 85-26017, severing same into Cause No. 79-26873(A)(B)(C) are vacated.

2. Cause No. 79-20873 consolidated with Cause No. 85-26017 is reinstated in its entirety as Cause No. 79-26873 consolidated with Cause No. 85-26017.

3. Final judgments in Cause No. 79-26873 consolidated with Cause No. 85-26017, and any part or claim renumbered as Cause No. 79-26873(A)(B)(C), is vacated and a new trial is granted.

4. Final judgment in Cause No. 79-26873 consolidated with Cause No. 85-26017, and any part or claim renumbered as Cause No. 79-26873(A)(B)(C) is vacated and the cause of action reinstated as a part of Cause No. 79-26873 consolidated with Cause No. 85-26017.

5. Sanction orders granted by this Court against Republic Health Corporation are reinstated.

6. Order appointing Alvin Zimmerman as Master in Chancery is reinstated in its entirety.

December 16, 1986

/s/ Frank O. White
JUDGE PRESIDING

Supreme Court, U.S.
FILED
MAY 20 1994
OFFICE OF THE CLERK

No. 93-1656

In The

Supreme Court of the United States

October Term, 1993

P.T. EICHELBERGER, JR., M.D., et al.,

Petitioners,

v.

DOUGLAS AYCOCK, M.D., et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the Fifth Circuit Court of Appeals correctly ruled that a judgment debt based on malicious prosecution by the Petitioners is nondischargeable in bankruptcy under 11 U.S.C. § 523(a)(6).

PARTIES TO THE PROCEEDING

Petitioners are P.T. Eichelberger, Jr. and Louis B. Hughes.

Respondents are:

Douglas Aycock, Donald Chalmers, D.C. Delery, Clarence O. Dube, William H. Fagan, Eugene Fontenot, Charles Hill, Charles M. Howard, Glen Keller, Edward Roberson, E.O. Smith, Houston North Hospital Properties, Houston North Properties, Houston Northwest Medical Center, Inc., and Houston Northwest Medical Center Survivor, Inc.

There are no parent or subsidiary companies requiring disclosure under Rule 29.1 of the Rules of the Supreme Court of the United States.

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TABLE OF AUTHORITIES

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CASES CITED:

Grogan v. Garner, 498 U.S. 279, 111 S.Ct. 654, 112 L.Ed. 2d 755 (1991) 1, 2, 4

Kale v. Palmer, 791 S.W. 2d 628 (Tex. App. – Beaumont 1990, writ denied) 5

STATUTE CITED:

11 U.S.C. § 523 (a)(6) 1, 2, 4, 6

RULES CITED:

Rules of the Supreme Court of the United States:

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OPINIONS BELOW

This proceeding was originally instigated as a bankruptcy adversary proceeding in the United States Bankruptcy Court for the Southern District of Texas, Houston Division. The purpose of the proceeding was to determine the dischargeability of two judgments owed Respondents by Petitioners Hughes and Eichelberger.

After erroneously applying a heightened burden of proof for denial of discharge (i.e., clear and convincing evidence), the bankruptcy court found that Respondents, the judgment creditors, had failed to prove by clear and convincing evidence that the judgments were nondischargeable under Section 523(a)(6) of the Bankruptcy Code.

The district court on appeal held that under *Grogan v. Garner*, 498 U.S. 279, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991), the bankruptcy court had erred in applying the heightened burden of proof and ruled that the judgment debts based on tortious interference and malicious prosecution were nondischargeable under 11 U.S.C. § 523(a)(6).

Petitioners Hughes and Eichelberger then filed an appeal with the United States Court of Appeals for the Fifth Circuit. In an unpublished per curiam opinion, the Fifth Circuit affirmed the district court's ruling regarding the malicious prosecution judgment and reversed the district court's ruling regarding the tortious interference judgment.

REPLY TO PETITIONERS' STATEMENT OF JURISDICTION

The Court should deny the Petition for Writ of Certiorari for several reasons. First and foremost, the petition should be denied based on Petitioners' attempt to have this Court review by certiorari two state court judgments long after the deadline for doing so has passed. Sup. Ct. R. 13. Second, the petition should be denied since the Fifth Circuit's ruling is directly supported by this Court's decision in *Grogan v. Garner*, 498 U.S. 279, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991). Finally, the petition should be denied based on the failure of Petitioners to present their points for consideration with accuracy and clarity. Sup. Ct. R. 14.5.

STATUTORY PROVISIONS INVOLVED

11 U.S.C. § 523(a)(6) provides:

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt –

* * * *

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity;

* * * *

STATEMENT OF THE CASE

Rather than attempting to reargue and relitigate almost two decades of litigation as Petitioners have

sought to do, no attempt will be made to respond point by point to the numerous half truths, outright misstatements, and legal illogic which permeates the Petition for Writ of Certiorari. Instead, this Brief in Opposition will address only those facts which have a bearing on what issues would properly be before this Court if certiorari were granted. In that regard, a statement of the relevant facts appears below.

1. On November 24, 1982, a money judgment was entered against Petitioners in the 11th Judicial District Court of Harris County, Texas based on Petitioners' tortious interference.

2. On December 8, 1986, a money judgment was entered against Petitioners in the 334th Judicial District Court of Harris County, Texas for malicious prosecution.

3. Following Petitioners' filing of petitions for relief under Chapter 11 of the Bankruptcy Code, the Respondents filed a complaint in the bankruptcy proceeding requesting a determination that their claims against Petitioners based on the judgments were exempt from discharge in bankruptcy pursuant to 11 U.S.C. § 523(a)(6). That proceeding was eventually appealed to the district court and then to the Fifth Circuit.

4. As indicated above, the Fifth Circuit ruled that the judgment debt based on Petitioners' tortious interference is dischargeable but that the judgment debt based on Petitioners' malicious prosecution is nondischargeable. Because the Fifth Circuit has ruled that the judgment debt based on tortious interference is dischargeable, any complaints by Petitioners with respect to the validity of that debt are now moot and will not be addressed further.

SUMMARY OF THE ARGUMENT

The Fifth Circuit correctly ruled that the preponderance of the evidence standard applies to dischargeability cases and that collateral estoppel is appropriate in dischargeability cases to avoid relitigation of issues already resolved in state court. In addition, the Fifth Circuit correctly ruled that the judgment debt based on malicious prosecution by the Petitioners is nondischargeable in bankruptcy since a cause of action for malicious prosecution in Texas includes the elements of willfulness and malice found in 11 U.S.C. § 523(a)(6).

ARGUMENT

This Court in *Grogan v. Garner*, 498 U.S. 279, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991) made it clear that the correct burden of proof for dischargeability cases is preponderance of the evidence and that the application of collateral estoppel is appropriate in dischargeability cases in order to avoid relitigation of issues already resolved in state court. As pointed out by each of the courts below, a court cannot discharge a debtor from any debt for willful and malicious injury by the debtor. 11 U.S.C. § 523(a)(6).

In light of the foregoing, The Fifth Circuit correctly ruled that the bankruptcy court cannot discharge the judgment debt arising out of Petitioners' malicious prosecution. As pointed out by the Fifth Circuit in its opinion, to recover for malicious prosecution a plaintiff must prove these elements:

a. The defendant filed the suit without probable cause;

b. The defendant was malicious;

c. The defendant lost the suit; and

d. The suit damaged the plaintiff.

See, Kale v. Palmer, 791 S.W.2d 628, 633 (Tex. App. – Beaumont 1990, writ denied). Because all of the elements of willful malice set forth in Section 523(a)(6) are encompassed in the malicious prosecution cause of action, the Fifth Circuit correctly reasoned that the bankruptcy court could not discharge the judgment debt for malicious prosecution.

Contrary to what is argued in the Petition for Writ of Certiorari, there is absolutely no basis for avoiding the collateral estoppel effect of the malicious prosecution judgment. Each of the courts below found that the judgment was a valid final judgment and that the application of collateral estoppel was proper. Petitioners' contention that they received no notice of the trial setting and were denied due process is clearly refuted by the bankruptcy court's finding that "The statement of facts from that trial is replete with evidence of notice being given to debtors' counsel of the conduct of the trial." The bankruptcy court also pointed out that the court of appeals' decision in that case stated that "the record reflects a degree of participation in the trial of these cases that in our experience is unparalleled." Accordingly, Petitioners simply cannot now contend that they had no opportunity to litigate these matters. Likewise, there has never been any basis for Petitioners' assertion that the Respondents have perpetrated a "fraud on the courts", or have filed fraudulent proof of claims. Again, the courts below held that the

judgment was a valid judgment. In addition, the bankruptcy court did not purport to rule one way or the other on any objections to the proof of claims filed in this case instead expressly reserving that issue.

CONCLUSION

The correct burden of proof for dischargeability cases is the same as the burden of proof in the original suit, a preponderance of the evidence. Accordingly, the Fifth Circuit correctly ruled that the bankruptcy court had improperly applied a heightened burden of proof and that under the preponderance of the evidence standard, the bankruptcy court cannot discharge the judgment debt arising out of Petitioners' malicious prosecution because the malicious prosecution cause of action includes the elements of willful malice set forth in 11 U.S.C. § 523(a)(6). Accordingly, the Petition for Writ of Certiorari should be in all things denied.

Respectfully submitted,

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